United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-2489

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FOR THE SECOND CIRCUIT

ANONYMOUS J. and ANONYMOUS R., Attorneys Admitted to Practice in the State of New York,
Plaintiffs-Appellants,

against

THE BAR ASSOCIATION OF ERIE COUNTY and JOHN B. WALSH, General Counsel to the General Preliminary Investigation,
Defendants-Respondents.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

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Statement of the Issues Presented for Review

1. Are the Fifth and Fourteenth Amendments applicable to disciplinary proceedings against attorneys?

2. Was the institution of disciplinary proceedings and utilization of immunized testimony violative of plaintiffs' constitutional rights?

3. Is Title 42 United States Code § 1983 a basis for relief in the instant case?

4. Is the futility doctrine applicable when the Courts of the State of New York consistently refuse to recognize the applicability of immunity in Bar Association disciplinary matters?

Statement of Case

The plaintiffs commenced an action against the defendants, in the United States District Court, Western District of New York, on July 26, 1974, seeking, *inter alia*, a preliminary injunction and final judgment permanently enjoining the defendants from proceeding with disciplinary proceedings against them.

They also sought final judgment declaring that they may not be subjected to disciplinary proceedings on matters for which they were previously granted full transactional immunity and that their compelled testimony, elicited under grants of immunity, cannot be used against them in any manner whatsoever in such proceedings.

Said plaintiffs proceeded by an Order to Show Cause, granted on July 29, 1974, to secure the preliminary injunction sought pending the entry of final judgment.

The defendants filed no Answer but instead moved to dismiss the Complaint and Motion for Preliminary Injunction on the grounds that such Complaint failed to state a claim upon which relief could be granted and further that the Court lacked jurisdiction of the subject matter.

The Hon. John T. Curtin, on October 17, 1974, granted the defendants' Motion to dismiss the Complaint, without prejudice, and the plaintiffs have appealed from said Order.

Statement of Facts

Both plaintiffs are attorneys admitted to practice in the State of New York.

During the summer of 1971, the Erie County District Attorney's Office commenced a probe which later ripened into a Grand Jury investigation relative to alleged irregularities in the disposition of certain traffic matters in the City Court of Buffalo.

On December 14, 1971, the plaintiffs were called to testify before the Grand Jury and requested to execute formal written waivers of immunity in regard thereto.

On the advise of counsel they declined to do so.

When so advised the Grand Jury voted them full and complete transactional immunity in return for their testimony.

At that juncture and with full transactional immunity bestowed upon them, the plaintiffs were compelled to give testimony or suffer the consequences of a contempt citation.

Without executing a waiver of immunity, the plaintiffs were taken before the Grand Jury and testified.

A single indictment was returned against one individual and at the trial thereon the plaintiffs having been immunized as indicated, were called as witnesses and gave testimony.

Over a year after their trial testimony and two and one-half years after their Grand Jury testimony, both plaintiffs were served with a Petition and Notice of Motion instituted by the Defendant, Bar Association of Erie County, naming both of them and seeking to have them

disciplined. Plaintiff, ANONYMOUS R. was also named in a separate Petition and Notice of Motion, naming him alone and seeking the same punishment.

In the preparation of the Petitions, the defendants conducted no investigation, interrogated no witnesses, held no hearings whatsoever but prepared them and the charge therein contained wholly and solely from the immunized trial testimony of plaintiffs.

The plaintiffs stand charged with violating the Penal Law of the State of New York, Sections 115.00; 100.05; and 105.05, along with the Code of Professional Responsibility, Canons 1, 6, 7, 8 and 9.

The motions and petitions were returnable on June 25, 1974, before the State of New York, Supreme Court, Appellate Division, Fourth Department.

On that date an adjournment was requested and granted by the Court to August 1, 1974, and the matter has since been adjourned generally, allowing the plaintiffs to answer the Petitions or otherwise move with respect thereto while preserving and reserving all rights of the plaintiffs in the interim.

POINT I

The Fifth and Fourteenth Amendments are applicable to disciplinary proceedings against attorneys.

The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any *criminal* case to be a witness against himself," and this right and privilege, so afforded, has been held applicable to the States by reason of the Fourteenth Amendment. See *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489 (1964).

The defendants concede that the plaintiffs were given full transactional immunity,[1] without limitation or restriction, in return for their Grand Jury and trial testimony concerning transactions which are the direct subject of the disciplinary proceedings. Nevertheless, subsequent to the grant of immunity, the defendant Bar Association commenced its disciplinary proceedings against the plaintiffs relying solely upon the immunized testimony.

The plaintiffs contend that the immunity conferred was of the broadest possible type which totally insulated and immunized them from any criminal or *quasi-criminal* proceeding based thereon. They urge that the distinction between *criminal* and *quasi-criminal* proceedings is one with a difference and that the disciplinary proceedings against them which they now seek to enjoin are *quasi-criminal* in nature.

Obviously, disciplinary proceedings are not *traditionally criminal* in nature, but, since censure, suspension or disbarment can result, they are unquestionably *quasi-criminal.*

The Supreme Court held *In re Ruffalo,* 390 U.S. 544 (1968), that:

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex Parte Garland,* 4 Wall 333, 380, 18 L ed 366, 369; *Spevack v. Klein,* 385 U.S. 511, 515, 17 L ed 2d 574, 577, 87 S.Ct. 625. He is accordingly entitled to procedural due process . . . ."

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[1] Immunity. A person who has been a witness in a legal proceeding, and who cannot, except as otherwise provided in this subdivision, be convicted of any offense or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he gave evidence therein, possesses "immunity" from any "such conviction, penalty or forfeiture." (New York Criminal Procedure Law § 50.10)

The Court concluded:

> "These are adversary proceedings of a *quasi-criminal* nature. Cf. *In re Gault*, 387 U.S. 1, 33, 18 L ed 2d 527, 549, 87 S.Ct. 1428." (Emphasis added)

The sanctions which may be imposed on attorneys as the result of disciplinary proceedings are of a real significance. These measures constitute punishment, penalty and forfeiture which reflect the *quasi-criminal* nature of the proceedings in the first instance.

No one can seriously question the fact that censure, suspension from the practice of law or disbarment therefrom constitutes punishment, penalty and forfeiture in a very real sense.

To an attorney, the ability to practice his profession directly relates to his economic survival and any punishment, penalty or forfeiture in that regard is an economic disaster which threatens his very livelihood.

> ". . . [t]he lawyer's abilities, acquired through long and expensive education, and the good will attached to his practice, acquired in part through uncompensated services, are capital assets that belong to the lawyer . . .
>
> These assets should be no more subject to confiscation than his home or any other asset he may have acquired through his industry and initiative." *Cohen v. Hurley*, 366 U.S. 117 (1961), Dissenting Opinion, Mr. Justice Black at pg. 146.

The Supreme Court, as early as 1891, in *Counselman v. Hitchcock*, 142 U.S. 547, 563, 564, recognized that the Fifth Amendment privilege against self-incrimination included protection against penalties, fines and forfeitures.

> "It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding,

to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures."

Even before that case, the Court, in *Boyd v. United States,* 116 U.S. 616 (1886), stated:

". . . As therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this *quasi-criminal* nature, we think that they are within the reason of the *criminal* proceedings for all the purposes of the Fourth Amendment of the Constitution, and that portion of the Fifth Amendment which declares that no person shall be compelled in any *criminal* case to be witness against himself." (Emphasis added)

The Supreme Court in *Spevack v. Klein,* 385 U.S. 511 (1967), held that disbarment and the deprivation of a livelihood cannot be imposed upon a lawyer in derogation of his right to assert the privilege in a disciplinary proceeding.

"We conclude that Cohen v. Hurley should be overruled, that the self-incrimination clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as other individuals and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it." (Pg. 627)

"We find no room in the privilege against self-incrimination for classification of people so as to deny it to some and extend it to others. Lawyers are not excepted from the words. No person . . . shall be compelled in any *criminal* case to be a witness against himself; and we can imply no exception." (Pg. 628) (Emphasis added)

As was evidenced in the Court below, by their reliance upon *Younger v. Harris,* 401 U.S. 37 (1971); *Erdmann v. Stevens,* 458 F 2d 1205 (2d Cir. 1972), cert. denied, 409 U.S. 889 (1972), the defendants did not dispute the fact that

disciplinary proceedings against attorneys are *quasi-criminal* in nature and the defendants' motion to dismiss for failure to state a cause of action and lack of jurisdiction and the District Court granting of said motion was predicated upon such a premise. Such argument raised the very substantive issue which the defendants, on procedural grounds seek to avoid.

In *Erdmann v. Stevens, supra,* which will hereafter be discussed, the Second Circuit held:

> "that in our view a court's disciplinary proceeding against a member of its bar it comparable to a *criminal* rather than a civil proceeding . . . However, it cannot be disputed that for most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine. See *Bradley v. Fisher,* 80 U.S. [13 Wall] 335, 355, 20 L.Ed. 646 (1872); Spevack v. Klein, 385 U.S. 511, 516, 87 S.Ct. 625, 17 L.Ed. 2d 574 (1967). Furthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment-loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and in his client relations as well as adversely affect his ability to carry out his professional functions, particularly if his branch of the law is trial practice. Undoubtedly these factors played a part in leading the Supreme Court to characterize disbarmen proceedings as being 'of a *quasi-criminal* nature'. *In re Ruffalo,* 390 U.S. 544, 551, 88 S. Ct. 122, 20 Ltd. 2d 117 (1968)." at 1209-1210. (Emphasis added)

It is clear that Bar Association disciplinary proceedings against attorneys are thus not *traditionally criminal* proceedings but *quasi-criminal* in nature, and as such the transactional immunity granted the plaintiffs constitutes a complete bar thereto.

POINT II

The Institution of Disciplinary Proceedings and the utilization of immunized testimony violates plaintiffs' Constitutional rights.

The instant disciplinary proceedings, in general and the use of the compelled testimony, in particular, are violative of plaintiffs' civil rights and prohibited as unconstitutional in violation of the Fifth Amendment protection against self-incrimination made applicable to the states by the Fourteenth Amendment.

In *Kastigar v. United States*, 406 U.S. 441 (1971), the Court held that the Constitution permits testimony to be compelled if neither it nor its fruits are available for use, and that the testimony, as elicited, cannot lead to the infliction of *criminal* penalties.

The plaintiffs, having been granted full transactional immunity by the State, must be afforded whatever immunity is necessary to supplant this privilege.

> ". . . The State must recognize that our cases hold: That answers elicited upon the threat of the loss of employment are compelled and inadmissible in evidence. Hence, if answers are to be required in such circumstances, States must offer to the witness whatever immunity is required to supplant the privilege and may not insist that the employee or contractor waive such immunity." *Lefkowitz v. Turly*, 94 S.Ct. 316, 325 (1973).

In *Lefkowitz, supra*, (at P. 324):

> "Immunity is required if there is to be 'rational accommodation between the imperatives of the privilege and legitimate demands of government to compel citizens to testify.' *Kastigar v. United States*, supra, 406 U.S., at 446. It is in this sense that immunity statutes have 'become part of our constitutional fabric'. *Ullman v. United States*, 350 U.S. 422, 438 (1968)."

The State of New York after having granted the plaintiffs' full transactional immunity are attempting to nullify that immunity by using the plaintiffs' immunized testimony in a *quasi-criminal* proceeding.

Had the plaintiffs refused to testify, after having received a grant of immunity, they would have been incarcerated for their contempt and, most assuredly, would have encountered bar association disciplinary proceedings seeking to punish them for their refusal to testify. On the other hand, having testified, the defendants have used, and intend to use, that compelled testimony to prosecute its present disciplinary action. Thus, in either event, if the utilization of their compelled testimony is permitted, the plaintiffs would be, as they presently are, confronted with a most serious threat to their livelihoods.

As stated in *Garrity v. New Jersey,* 385 U.S. 493 (1967):

> "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent". at 497.

The institution of the disciplinary proceedings, in general, and the use of the compelled testimony, in particular, are thus violative of the Fifth and Fourteenth Amendment rights of these plaintiffs.

POINT III

Title 42 United States Code § 1983 is a basis for relief herein and is not subject to the restrictions of 28 U.S.C. § 2283 and *Younger v. Harris*.

42 U.S.C. § 1983 provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In the instant action, the defendants are proceeding against the plaintiffs, pursuant to the New York State Judiciary Law § 90, and have used, as the basis for their petitions, and threaten to use, in the prosecution of this matter, testimony given by the plaintiffs under grants of immunity, as hereinabove detailed. It is contended that the institution and maintenance of disciplinary proceedings, investigating the conduct which was the subject of the plaintiffs' immunized testimony, violates their respective rights protected by the Fifth and Fourteenth Amendments to the United States Constitution (See *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964)) and that the rights of the plaintiffs, so protected, are the proper subjects for relief under 42 U.S.C. § 1983 (See *Hardwich v. Hurley*, 289 F.2d 529 (7th Cir. 1961)).

That the Federal anti-injunction statute (28 U.S.C. § 2283) does not preclude Federal intervention where a claim is founded upon 42 U.S.C. § 1983 was definitely determined, by the Supreme Court, in *Mitchum v. Foster*, 407 U.S. 225 (1972).

> "The very purpose of § 1983 was to interpose the Federal Courts between the States and the people, as guardians of the people's Federal rights to protect the people from the unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' *Ex Parte Virginia*, 100 U.S., at 346. In carrying out that purpose, Congress plainly authorized the Federal Courts to issue injunctions in § 1983 actions, by expressly authorizing a 'suit in equity' as one of the means of redress. And this Court long ago recognized that Federal injunctive relief against a State Court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. (citing cases) For these reasons we conclude that, under the criteria established in our previous decisions construing the anti-injunction statute, § 1983, is an Act of Congress that falls within the 'expressly authorized' exception of that law." *Mitchum v. Foster, supra*, 407 U.S. at 242-243.

The holding of *Younger v. Harris*, 401 U.S. 37 (1971), is not applicable to the instant action. In *Younger*, the moving party had sought a federal injunction of a pending state *criminal* prosecution, on the grounds that the *criminal* statute was unconstitutional. The Supreme Court, in refusing such relief, relied on principles of equity and comity and held that

> ". . . the possible unconstitutionality of a statute 'on its face' does not itself justify an injunction against good faith attempts to enforce it and that the Appellee Harris has failed to make any showing of . . . any . . . unusual circumstance that would call for equitable relief." at 54.

The Court attempted to discern the source of its policy against federal court interference with state court proceedings and found it to be

> "The basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a *criminal* prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." at 43-44. (Emphasis added)

The case at bar does not involve a pending state *criminal* proceeding and even the *Younger* court recognized that there was no problem in federal courts' enjoining unconstitutional state action that is not part of a *criminal* prosecution. *Younger v. Harris, supra,* at 47, N.4. In *Blouin v. Dembitz,* 489 F. 2d 488 (2d Cir. 1973), the Court, in commenting on the holding of *Younger,* held that:

> ". . . we do believe that the particularly stringent formation of that doctrine should be limited, at least until the Court instructs otherwise, to cases involving *traditionally criminal* proceedings." at 490-491 (Emphasis added)

A finding that a bar association disciplinary proceeding in the State of New York is not a *traditionally criminal* proceeding is inescapable, in that the proceeding is not commenced with an indictment or information, there is no right to a trial by jury, the quantum of proof necessary to sustain a determination of misconduct is less than "beyond a reasonable doubt," and the respondent is not afforded the presumption of innocence. See *Feola v. New York State Bar Association,* 37 A.D. 2d 789, 324 N.Y.S. 2d 654 (3rd Dept. 1971).

It is also to be noted that *Younger* did not involve an application for relief under 42 U.S.C. § 1983. In the present action the District Court, below, relied upon *Anonymous v. Association of the Bar of the City of New York and John G. Bonomi,* 74 Civ. 2398, an, as yet, unreported decision of the U.S. District Court for the Southern District of New York

(decided August 1, 1974). Yet nowhere does it appear, in that decision, that § 1983 had been asserted as a basis for relief or that the Court considered that Section in reaching its determination.

Apposite to the facts of this proceeding is *Freeman & Bass v. State of New Jersey Commission of Investigation,* 359 F. Supp 1053 D.N.J. (1973), where § 1983 was asserted as a basis for relief by the Attorney-plaintiffs, who sought a Federal injunction enjoining the investigatory practices of a State disciplinary body. The Court refused to dismiss the Complaint and held that:

> "Although Federal Courts shall be hesitant to issue injunctive relief against State action for reasons of comity, that policy has been abrogated in § 1983 actions. Thus, for example, actions brought pursuant to § 1983 present a specific exception to the anti-injunction statute . . . Moreover, since no state *criminal* prosecution is pending, I would find no reason to refrain from granting relief under *Younger v. Harris* . . ." *Freeman & Bass v. State of New Jersey Commission of Investigation, supra,* at 1061 (Emphasis added)

In commenting on the rationale and purpose of § 1983 (then § 1979), the Supreme Court has stated that:

> "It is abundantly clear that one reason the legislation was passed was to afford a Federal right to Federal Courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, State laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the State agencies." *Monroe v. Pape,* 365 U.S. 167, 180 (1960).

In *Gibson v. Berryhill,* 411 U.S. 564, 93 S.Ct. 1689 (1973), the plaintiffs brought an action, claiming relief under § 1983, to enjoin a State Board of Optemetry from disciplining them for having engaged in certain allegedly pro-

hibited practices. In rejecting the argument that the doctrine of *Younger v. Harris*, 401 U.S. 37, and related cases, precluded the granting of relief, the Court noted that:

> "Those cases and principles would, under ordinary circumstances, forbid either declaratory judgment or injunction with respect to the validity or enforcement of a State *statute* when a *criminal* proceeding under the Statute has been commenced." *Gibson v. Berryhill, supra*, at S.Ct. 1696 (emphasis added).

Thus the Court seems to have constrained its application of *Younger* to *traditional criminal* proceedings. This decision has evoked the comment, from Judge Oakes, in a dissenting opinion, in *Tang v. Appellate Division of New York Supreme Court, First Department*, 487 F. 2d 138 (2d Cir 1973), that:

> "Even application of the doctrine of 'comity' in the disciplinary context of *Erdmann* is open to dispute, moreover, in view of the Supreme Court's recent decision in *Gibson v. Berryhill* . . .," at 146, n.4.

Further, in *Polk v. State Bar of Texas*, 480 F.2d 998 (7th Cir 1973), a § 1983 action to enjoin a state disciplinary proceeding, the Court held, that, in such a context for the purposes of applying the doctrine of comity, the characterization of the State proceeding must be determined with reference to State Law (see, also, *Gibson v. Berryhill*, 411 U.S. 564; *Younger v. Harris*, 401 U.S. 37 (1971) Stewart, J. concurring, at p. 55, n.2) This approach seems logical, if the purpose of comity is the recognition of the exclusive jurisdiction of the States, except in special circumstances, to tend to their own *criminal* matters, without Federal intervention. In restricting their interference, the Courts have, and will, recognize the "label" applied by the State Courts in § 1983 actions. If this is determinative, then, solely for the purposes of the application of the principles of *Younger*,

the federal courts should not feel constrained to proceed in the instant action, for the Courts of the State of New York have consistently deemed disciplinary proceedings, under Judiciary Law § 90, as *civil* in nature (See *In Re Randel*, 158 N.Y. 216, 52 N.E. 1106 (1899); *Rochester Bar Association v. Dorthy*, 152 N.Y. 596, 46 N.E. 1106 (1897), *Feola v. New York State Bar Association*, 37 A.D. 2d 789, 324 N.Y.S. 2d 654 (1971).

Contrary to the facts of *Younger v. Harris, supra*, where *Harris* had an adequate remedy at law and where the denial of injunctive relief would not result in irreparable injury, if these defendants are allowed to proceed with their disciplinary actions, using the immunized testimony of the plaintiffs to sustain the allegations contained in the petitions, the plaintiffs herein would suffer great, immediate and irreparable harm, occasioned solely as a result of a deprivation of their constitutional rights—a deprivation routinely and consistently practiced by the State of New York in disciplinary proceedings where Fifth Amendment privileges are asserted as a defense or bar. The harm and loss to be suffered by the plaintiffs, of course, is the immediate and disasterous loss of livelihood and earning ability which would, with more than a reasonable probability, ensue following a determination by the Appellate Division, Fourth Department, whether that determination be censure, suspension or disbarment. In accordance with Judiciary Law 90, upon a finding of misconduct, the proceedings no longer remain confidential, as they are supposed to be theretofore, but, rather, become a matter of public record, available to all, including, and most notably, the media.

One of the most valuable assets of an attorney is the image he projects to the public. This public opinion is, in large measure, formed as a result of the esteem with which

the lawyer is regarded by members of the bench and bar. The public reporting of the imposition of judicial sanctions, in any manner whatsoever, would severely impair the ability of the plaintiffs to successfully, and profitably, practice their profession. Furthermore, and even more drastically, should the Appellate Division order suspension or disbarment, the effective date of such a penalty would be almost immediate and, in any event, in advance of any review by the New York State Court of Appeals or the Supreme Court of the United States. During any period of suspension or disbarment, these plaintiffs would be completely and absolutely enjoined from practicing law in the Courts of the State of New York, or even clerking in a law office. An eventual reversal of the Appellate Division determination would not restore the plaintiffs to their present position, either financially or in the eyes of the public.

The real threat of this irreparable loss compelled the plaintiffs to commence this action, and, as explained in *Mitchum v. Foster*, 407 U.S. 225 (1972), the purpose for the existence of 42 U.S.C. § 1983, is to prevent such an occurrence.

> "It is the duty of Courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachment thereon." *Boyd v. United States*, 116 U.S. 616, at 635 (1886).

POINT IV

The Doctrine of Federal Abstention is not applicable when the Courts of the State of New York consistently refuse to recognize the applicability of previously granted immunity in bar association disciplinary matters.

Traditionally and uniformly, the Courts of the State of New York have held that compelled testimony given pursuant to grants of transactional immunity and obtained only as a result thereof, are admissible in bar association disciplinary proceedings despite the existence of the Fifth and Fourteenth Amendments of the United States Constitution, and the Federal Court decisions decided thereunder.

In *In Re Selig*, 302 N.Y.S. 2d 94 (1969), the Court, citing *Zuckerman v. Greason*, 285 N.Y.S. 2d 1 (1968), rejected the attorney's argument that his immunized testimony was inadmissible in the pending disciplinary matter, and stated that

> ". . . The said holdings, however, do not prescribe the use of compelled testimony resulting from the grant of immunity in a proceeding other than a *criminal* action or proceeding. Moreover, it has been specifically held that such evidence is admissible in a disciplinary proceeding". at 95. (Emphasis added)

Again, in *In Re Epstein*, 325 N.Y.S. 2d 657, 37 A.D. 2d 333 (1971), Motion for leave to appeal denied, 327 N.Y.S. 2d 1076 (1971), Motion to dismiss appeal granted, 328 N.Y. S. 2d 1031, U.S. cert. denied 405 U.S. 1046, 37 A.D. 2d 333 (1971), the respondent in a disciplinary action claimed

> "That the prosecution of this disciplinary proceeding was without warrant in law due to the immunity which had been conferred on him when he testified on the subject matter of the charge, before a Grand Jury of

> the County of New York; and further that the evidence obtained and used against him was obtained and used in violation of the respondent's rights under the Constitutions of both the United States and the State of New York." at 657-58

The Court concluded that

> "His claim that the prosecution of this disciplinary proceeding was without warrant to law because the only evidence introduced by petitioner in support of the charges was the respondent's testimony before the Grand Jury must be rejected. *Matter of Ungar*, 27 A.D. 2d 925, 282 N.Y.S. 2d 158 leave to appeal denied, 20 N.Y. 2d 642, 282 N.Y. 25 2d 1026, 229 N.E. 2d 326, cert. denied, 389 U.S. 1007, 88 S.Ct. 564, 19 L. Ed. 2d 603; *Matter of Farrell*, 27 A.D. 2d 61; *Matter of Klebanoff*, 27 A.D. 2d 332 and *Matter of Selig*, 32 A.D. 2d 213, 302 N.Y.S. 2d 94." *In Re Epstein, supra*, at 658.

This refusal to recognize the privilege against self-incrimination has been based on the established, entrenched, New York decisional law which has held that disciplinary proceedings are "civil", in nature and not *criminal* or *quasi-criminal*.

The New York Court of Appeals has stated in *Zuckerman v. Greason*, 285 N.Y.S. 2d 1, 6 (1968), that

> "Disciplinary proceedings for professional misconduct are civil in nature." [To the same effect, See *In Re Randell*, 158 N.Y. 216, 52 N.E. 1106 (1899), *In Re Lynch*, 227 App. Div. 471, 238 N.Y.S. 482 (1930), *In Re Rothenberg*, 18 A.D. 2d 397, 239 N.Y.S. 2d 591 (1963), *In Re O'Neill*, 184 App. Div. 75, 171 N.Y.S. 514 (1914), *Feola v. New York State Bar Association*, 37 A.D. 2d 789, 324 N.Y.S. 2d 654 (1971).]

These holdings, that disciplinary proceedings are civil in nature, are contrary to the interpretation of such proceedings by the Federal Courts. See *In Re Ruffalo*, 390 U.S. 544 (1968).

Given the New York State Court's traditional unwillingness to apply the protections of the Fifth and Fourteenth Amendment safeguards for the benefit of attorneys in disciplinary proceedings, a request for such recognition would be futile.

Federal Courts will not, and should not, abstain from exercising jurisdiction where recent State holdings on a question of substantive law demonstrate that relitigation of the same issue would have proven futile. *United States ex rel. Lois Sero, et al. v. Peter Preiser*, 2nd Circuit-Docket #74-1944 P. 29, decided Nov. 6, 1974.

The Federal Courts will entertain jurisdiction if the State Court had recent opportunity to consider the identical claim, and its decision of the issue is so clear ". . .that any further consideration given similar cases by the State Court is likely to be summary . . ." *United States ex rel. Lois Sero, et al. v. Peter Preiser, supra*, at 29.

The "futility doctrine" is equally applicable to the principles of abstention or exhaustion.

Even *Younger* recognized the uselessness of always requiring resort to State Courts, citing *Ex Parte Young*, 209 U.S. 123 (1908), the Court held that

> "The accused should first set up and rely upon his defense in the State Courts . . . *unless it plainly appears that this course would not afford adequate protection.*" 401 U.S. 371, 91 S. Ct. 745, 750 (1971). (Emphasis added)

Moreover, the "futility doctrine" was not applicable in *Erdmann v. Stevens*, where an attorney who authored an article in Life Magazine highly critical of judges, was served with a Petition and Order to Show Cause in a disciplinary proceeding based upon the publication of said

article. Erdmann sought injunctive relief in federal court against the disciplinary proceedings on the grounds that the proceedings violated his First Amendent constitutional rights by depriving him freedom of access to the press, and denying him the right to petition for redress of grievances.

The constitutional issue before the Second Circuit in *Erdmann, supra*, was whether the institution of disciplinary proceedings was a violation of his First Amendment rights. The Second Circuit held that New York Courts had the competency to decide these First Amendment questions and recognized that First Amendment rights had been, therefore, adequately protected by New York Courts. However, this has not been the case where Fifth and Fourteenth Amendment rights have been involved. As hereinabove discussed, the New York Courts have consistently rejected the contention that the privilege against self-incrimination is available in the context of Bar Association disciplinary proceedings, and, unlike *Erdmann, supra*, resort to the state courts in the instant case would be futile.

Erdmann, further, may be distinguished from the present action in that the former involved the question of the application of State standards to certain alleged conduct to determine whether or not it was misconduct warranting disciplinary sanctions. The nature of the conduct had to first be determined by the State Court. Here the claim is that mere institution of the proceedings are violative of the plaintiff's rights.

More positively, the Court in *Erdmann, supra*, stated that:

> ". . . a Court may neither act arbitrarily with respect to those licensed by it nor otherwise violate their constitutional rights . . ." at 1210.

Yet, to permit the New York Courts to proceed in this action, would most assuredly result in the violation of the constitutional rights of these plaintiffs.

In *Anonymous v. The Association of the Bar of the City of New York and John G. Bonomi, General Counsel*, 74 Civil 2398 U.S.D.C. of SO. of N.Y., the court felt itself bound by *Erdmann, supra,* ignoring the very clear language, contained in *Blouin v. Dembitz, supra*, limiting the application of the *Younger* principles to *traditionally criminal* actions. Most assuredly, as hereinbefore discussed, Bar Association disciplinary matters are not *traditionally criminal* proceedings.

Further, the Court, in *Anonymous*, ignored the constitutional issues raised by the plaintiff on the grounds that state court action followed by a request for Supreme Court review was adequate to protect the lawyer's constitutional rights. The court refused to concede the futility of resort to the state court, despite the New York Courts' unwillingness to apply the protections of the Fifth and Fourteenth Amendments to attorneys.

Since the Courts of the State of New York have consistently and unyieldingly refused to recognize the *quasi-criminal* nature of bar association disciplinary proceedings and the consequent applicability of previouly granted immunity thereto, it would be, and is, futile to compel these plaintiffs to seek the enforcement of their constitutional privileges in that forum.

To avoid great, severe, and immediate and irreparable loss and injury, federal intervention is mandated.

Conclusion

The Order of the United States District Court, Western District of New York, dismissing plaintiffs' Complaint and denying plaintiffs' Motion for a Preliminary Injunction enjoining the defendants from proceeding with disciplinary proceedings against plaintiffs, should be reversed.

Dated: December 17, 1974.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: Anonymous J. et al
v
The Bar Association of Erie County et al
Docket No. 74-2489

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 20 day of December, 19 74 I mailed 3 copies of a printed Appendix ~~XX~~ and Brief the above case, in a sealed, postpaid wrapper, to:

John B. Walsh, Esq.

10 Ellicott Square Court

Buffalo, New York 14203

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

James I. Myers, Esq.

120 Delaware Avenue, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

20 day of December, 19 74

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19..7.5